The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHERYL KATER and SUZIE KELLY, individually and on behalf of all others similarly situated, *Plaintiffs*, *v.* CHURCHILL DOWNS INCORPORATED, a Kentucky corporation, and BIG FISH GAMES, INC., a Washington corporation. *Defendants*.	No. 15-cv-00612-RSL **PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT** Noting Date: January 15, 2021
MANASA THIMMEGOWDA, individually and on behalf of all others similarly situated, *Plaintiffs*, *v.* BIG FISH GAMES, INC., a Washington corporation; ARISTOCRAT TECHNOLOGIES INC., a Nevada corporation; ARISTOCRAT LEISURE LIMITED, an Australian corporation; and CHURCHILL DOWNS INCORPORATED, a Kentucky corporation, *Defendants.*	No. 19-cv-00199-RSL **PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT** Noting Date: January 15, 2021

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INTRODUCTION

In 2015, Cheryl Kater initiated the first ever case alleging that social casino apps are illegal gambling under Washington law. Since that time, and joined by Suzie Kelly and Manasa Thimmegowda, Plaintiffs have vigorously litigated these cases before this Court, the Ninth Circuit (twice), the Washington State Gambling Commission, and even the Washington Legislature. After a 12-hour marathon mediation with the Honorable Layn R. Phillips (ret.), Plaintiffs and Defendants Churchill Downs, Big Fish Games, Aristocrat Technologies, and Aristocrat Leisure reached a class settlement, the cornerstone of which is the establishment of a non-reversionary $155 million common fund. At that level of recovery every class member who has ever lost money playing Defendants' social casino games can get a substantial portion of their losses back, and those with higher levels of losses are entitled to recover increasingly higher percentages of their losses. Utilizing data from the Platform Providers—the entities through which Class Members purchased chips to gamble at Defendants' social casinos—the Court-approved Notice Plan has been successfully implemented.

The reaction of the class to date has been exceptional: more than 50,000 Class Members have already submitted claims and the claims deadline is still several weeks out. By contrast, one class member has so far requested exclusion and there are currently no objections. Given the life-changing relief afforded, this volume of claims is not surprising and is consistent with the projections at preliminary approval. Participating Class Members stand to recover substantial portions of their losses with those that have lost the most standing to recover more than half of their gambling losses. *See* Declaration of Steven Weisbrot, Dkt. 219 ¶¶ 50-53. By way of example, Class Representatives Thimmegowda, Kater, and Kelly, who have previously estimated their losses at approximately $4,000, $40,000, and $400,000, are according to those estimates projected to recover $500-$1,000 (Thimmegowda), $10,000-$20,000 (Kater), and $200,000-$300,000 (Kelly). *Id.* Equally as important, the Settlement requires Defendants to provide addiction-related resources within their social casino games and create and honor a self-exclusion policy likes those at Washington brick-and-mortar casinos.

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Given the novelty of Plaintiffs' claim, Professor William B. Rubenstein (author of influential treatise NEWBERG ON CLASS ACTIONS) describes the recovery as an "astounding accomplishment" and calls the relief provided "historic." And although there are no truly comparable settlements, it dwarfs its nearest factual equivalent, *In re Apple In-App Purchase Litigation.*, No. 5:11-CV-01758 EJD, 2013 WL 1856713, at *1 (N.D. Cal. May 2, 2013) (providing $5 to users of apps that "compel children playing them to purchase large quantities" of in-game currency, "amounting to as much as $100 *per purchase* or more") (emphasis added) and far surpasses the typical consumer privacy class settlement, which often provides *cy pres* relief with no individual payments, *see In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 740 (9th Cir. 2017), *vacated on other grounds by Frank v. Gaos*, 139 S. Ct. 1041 (2019).

For the reasons that follow, this settlement is fair, reasonable, and adequate and the Court should not hesitate to grant final approval.

BACKGROUND

For the Court's convenience, the "Background" section from Class Counsel's contemporaneously-filed motion for attorneys' fees, expenses, and incentive awards is replicated below.

In 2014, Class Counsel began investigating the burgeoning social casino industry. *See* Declaration of Todd Logan ("Logan Decl.") ¶ 3. The results of that investigation were startling: multinational gambling corporations like Churchill Downs, International Game Technology, and Scientific Games had found a way to smuggle slot machines onto consumers' smart phones without complying with any federal or state gambling laws. *Id.* ¶ 4. By 2015, social casino games like "Big Fish Casino" were capturing more than $3 billion in annual revenues.[1] Those revenues, just like those of Vegas casinos, were disproportionately derived from gambling addicts who just couldn't stop themselves from buying chips and spinning the slots. Moreover,

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1 *See* Dean Takahashi*, 13 predictions for the future of the $3.4B social casino games market*, GAMESBEAT (Oct. 19, 2015, 6:00 AM), *available at* https://bit.ly/37TPao9.

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those revenues—at least in Class Counsel's judgment—were entirely ill-gotten gains under a variety of state gambling laws. *See* Logan Decl. ¶ 4.

Based on that investigation, in 2015 Class Counsel initiated a nationwide, multi-forum campaign against the social casino industry. As Professor William B. Rubenstein, the sole author of NEWBERG ON CLASS ACTIONS, summarizes that campaign (and its results):

> Prior to entering academia, I was a lawyer at the national office of the American Civil Liberties Union (ACLU) for nearly a decade, during which time I pursued civil rights campaigns on behalf of minority groups. Based on that experience, it strikes me that what Class Counsel have pursued here is closer in form to a civil rights litigation campaign than it is to a series of discrete class action settlements. Class Counsel saw an injustice – a thinly disguised form of gambling preying on those most vulnerable to addictive gambling – and they sought to fix it. Their goal was not to win a case but to reform an entire industry, much like a civil rights campaign might aim to reform a particular type of discriminatory practice across an entire employment sector. To accomplish this end, Class Counsel went far beyond what lawyers pursuing a simple class action case would normally do. Class Counsel pursued multiple cases. Class Counsel pursued multiple defendants. Class Counsel filed actions in multiple forums. Class Counsel tested various state laws. Class Counsel built websites to help app users avoid forced arbitration clauses, lobbied legislators and regulators, and took their efforts to the media. When Class Counsel lost, they did not give up, but changed tactics or forums and kept going. And they did all of this with their own funds, risking millions of dollars of their own money to end this practice. What they have achieved so far, with these initial settlements, is an astounding accomplishment that begins to chip away at the pernicious underlying social casinos.

Declaration of Professor William B. Rubenstein ("Rubenstein Decl.") ¶ 2.

Because the extraordinary settlement here is but a part of Class Counsel's efforts carrying the banner nationwide for victims of the social casino industry, a summary of Class Counsel's efforts both before this Court and otherwise is provided below.

I. Class Counsel's 2015 Social Casino Lawsuits, Including *Kater*.

Having concluded that social casinos constitute gambling, between April and October of 2015, Class Counsel filed five (5) proposed class action lawsuits, in four (4) different courts, alleging class claims under five (5) different sets of state gambling laws. *See* **(1)** *Mason v. Mach. Zone, Inc.*, No. 15-cv-01107 (D. Md. Apr. 17, 2015) (alleging claims under California and Illinois gambling laws); **(2)** *Kater v. Churchill Downs Inc.*, No. 15-cv-612 (W.D. Wash. Apr. 17,

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2015) (alleging claims under Washington gambling law); **(3)** *Dupee v. Playtika Santa Monica, et al.*, No. 15-cv-01021 (N.D. Ohio May 21, 2015) (alleging claims under Ohio and Nevada gambling laws); **(4)** *Phillips v. Double Down Interactive LLC*, No. 15-cv-04301 (N.D. Ill.) (removed May 14, 2015) (alleging claims under Illinois gambling laws); **(5)** *Ristic v. Mach. Zone*, *Inc.*, No. 15-cv-08996 (N.D. Ill. Oct. 9, 2015) (alleging claims under Illinois gambling laws).

Each federal district court initially presented with Class Counsel's theory of these cases—*i.e.*, that social casinos are illegal gambling and consequently must return to consumers their ill-gotten gains—squarely rejected it. *See Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 316 (4th Cir. 2017); *Kater v. Churchill Downs Inc.*, No. C15-612 MJP, 2015 WL 9839755, at *3 (W.D. Wash. Nov. 19, 2015), *rev'd*, 886 F.3d 784 (9th Cir. 2018); *Dupee v. Playtika Santa Monica*, No. 15-cv-01021, 2016 WL 795857, at *1 (N.D. Ohio Mar. 1, 2016); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016); *Ristic v. Mach. Zone, Inc.*, No. 15-CV-8996, 2016 WL 4987943, at *4 (N.D. Ill. Sept. 19, 2016). In representative fashion, Judge Pechman's dismissal order in *Kater* concluded that "Big Fish Casino does not award something of value satisfying the requisite prize element, and therefore the game is not 'illegal gambling' under Washington law." *Kater*, 2015 WL 9839755, at *3.

II. Class Counsel Appeals The *Kater* Dismissal And The Ninth Circuit Reverses.

Following Judge Pechman's dismissal order in *Kater*, Class Counsel appealed. Merits briefing before the Ninth Circuit concluded in September 2016, and oral argument was held in February 2018. Along the way, Defendant Churchill Downs moved to substitute Big Fish Games, Inc. as the real party in interest, on grounds that as a result of an impending sale it would "soon lack any interest in either Big Fish Games, Inc., or Big Fish Casino." *Kater v. Churchill Downs*, No. 16-35010, Dkt. 48 at 6 (9th Cir. 2018). Class Counsel opposed that motion. *See id.*, Dkt. 50 at 3 ("Ms. Kater alleges that Churchill Downs—not Big Fish Games—retained the benefit of what she lost gambling at the Big Fish Casino.")

In March 2018, the Ninth Circuit reversed:

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> In this appeal, we consider whether the virtual game platform "Big Fish Casino" constitutes illegal gambling under Washington law. Defendant–Appellee Churchill Downs, the game's owner and operator, has made millions of dollars off of Big Fish Casino. However, despite collecting millions in revenue, Churchill Downs, like Captain Renault in *Casablanca*, purports to be shocked—shocked!—to find that Big Fish Casino could constitute illegal gambling. We are not. We therefore reverse the district court and hold that because Big Fish Casino's virtual chips are a "thing of value," Big Fish Casino constitutes illegal gambling under Washington law.

Kater, 886 F.3d 784, 785 (9th Cir. 2018). In that opinion, the Ninth Circuit dispensed with a variety of the arguments that had persuaded district courts nationwide to initially dismiss the social casino cases. For example, the Court rejected the argument that social casino chips "do not extend gameplay, but only enhance it." *Id.* at 787. The Circuit also rejected Big Fish's argument that the Washington State Gambling Commission ("WSGC") had determined that social casino games aren't gambling, concluding that "these documents do not indicate that the Commission adopted a formal position on social gaming platforms." *Id.* at 788. And the Ninth Circuit explicitly rejected "the reasoning of other federal courts that have held that certain 'free to play' games are not illegal gambling." *Id.*

The Ninth Circuit also denied Churchill Down's motion to be substituted out of the case. *See Kater*, No. 16-35010, Dkt. 55 at 10-11 n.4 (denying Churchill Downs' Rule 43(b) motion). Class Counsel's insistence that Churchill Downs remain in the case benefited the Class enormously, as Churchill Downs ultimately contributed $124 million of the $155 million settlement now before the Court.

III. Class Counsel's Post-Appeal Litigation Conduct Before This Court.

Upon remand, *Kater* was reassigned to Judge Leighton. Dkt. 59.[2] Churchill Downs promptly moved to compel Kater's case to arbitration, arguing that Kater had previously agreed to Big Fish Games' Terms of Use (and its mandatory arbitration provision). Dkt. 60. Kater opposed, arguing *inter alia* that Churchill Downs had waived any right to compel arbitration by seeking a dismissal on the merits in 2015. *See generally* Dkt. 68. In November 2018 Judge

[2] Unless otherwise indicated, all "Dkt." citations are to *Kater*, No. 15-cv-612 (W.D. Wash. Apr. 17, 2015).

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Leighton agreed, denying Churchill Downs' motion because "Churchill Downs waived its right to arbitration when it took its first bite of the apple and chewed thoroughly for over three years." Dkt. 75 at 11. Churchill Downs then answered Kater's complaint in November 2018. Dkt. 76.

In February 2019, the Parties began disputing the propriety of adding additional parties into the case. The results of these disputes were two-fold: first, Class Counsel filed an amended complaint in *Kater* adding Suzie Kelly as a Class Representative and adding Big Fish Games as a defendant, *see* Dkt. 85; and second, Class Counsel filed the *Thimmegowda* action as a companion case that expanded the temporal scope of the classes that Class Counsel sought to represent. *See Thimmegowda v. Big Fish Games*, No. 19-cv-199 (W.D. Wash.).

The next year of litigation was consumed with motion practice and discovery disputes. In May 2019, in the *Thimmegowda* action, Big Fish moved to compel arbitration, *see Thimmegowda* Dkt. 33, and Aristocrat and Churchill Downs moved to dismiss for lack of personal jurisdiction. *See Thimmegowda* Dkt. 35. The very same day, Big Fish and Churchill Downs moved to compel arbitration in the *Kater* matter. *See* Dkt. 100. With these motions pending, the Parties engaged in protracted negotiations over the manner and scope of discovery, which ultimately resulted in a sixteen-part discovery and scheduling agreement. *See* Dkt. 118. On September 12, 2019, Defendants' arbitration and jurisdiction motions were terminated with leave to refile when Judge Leighton stayed both cases pending the Ninth Circuit's disposition of an arbitration interlocutory appeal of an arbitration issue in a related case, *Wilson v. Huuuge, Inc.*, No. 18-cv-05276 (W.D. Wash.). *See* Dkt. 121.

By the fall, the cases veered further into waters uncharted in the class action space. In October 2019, Big Fish launched a pop-up in its games that—if clicked—purported to bind its players to the "Dispute Resolution Provision," requiring them to arbitrate any claims against Defendants and to cut the relevant statutes of limitations. Dkt. 218 ¶ 3. In response, Plaintiffs moved for a temporary restraining order to enjoin Big Fish from displaying the pop-up. *See* Dkt. 122. After briefing and argument, Judge Leighton granted Plaintiffs' motion in part, labeling Big Fish's pop-up "coercive and misleading." Dkt. 137 at 7. But in the same stroke, Judge Leighton

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ordered the Parties to propose language regarding any future similar pop-up windows, *see id.*, and after the Parties submitted competing proposals, the Court approved Defendants' proposal. Dkt. 145. With this Court-approved language in hand, Defendants aggressively presented their players with revised pop-ups in December 2019 (and then again in February 2020 and April 2020)—aimed at preventing putative class members, *en masse*, from participating in this litigation. Dkt. 218 ¶ 4.

Plaintiffs responded to this development in "enterprising" fashion, *see* Mar. 4, 2020 Hr'g Tr. at 5:9. Specifically, because the Court-approved language allowed putative class members to opt out of the arbitration provision, Plaintiffs' counsel established a website to help those class members opt out of Big Fish's Dispute Resolution Provision by sending Big Fish's legal department a postcard with the click of a button. *See* Dkt. 159. Within days of the website's launch, scores of putative class members had opted out of Big Fish's Dispute Resolution Provision. *See* Dkt. 218 ¶ 6. Defendants moved the Court for a Rule 23(d) protective order to immediately shut down Class Counsel's website, *see* Dkt. 164, but that motion was denied. *See* Dkt. 185. Both Parties appealed to the Ninth Circuit and both appeals were dismissed for lack of appellate jurisdiction. *See* Dkts. 188, 189.

In the midst of this dispute, Plaintiffs moved to certify a class under Fed. R. Civ. P. 23(b)(2) and to preliminarily enjoin the sale of virtual chips in Big Fish's games. *See* Dkt. 176. On March 4, 2020, prior to Defendants' response date, Judge Leighton denied Plaintiffs' motion without prejudice, spelling out a clear roadmap for the next steps in the litigation: Defendants' renewed arbitration and personal jurisdiction motions would come first, and in the meantime, the Parties would cooperate on a stipulated briefing schedule, ESI Protocol, Protective Order, and limited discovery. *See* Dkt. 185.

The Parties fought tooth and nail on each point. They could not reach agreement on a briefing schedule and proposed competing schedules to the Court. *See* Dkt. 186; Dkt. 187. They could not reach agreement on an ESI Protocol and Protective Order, so Plaintiffs moved for entry of the District's model orders. *See* Dkt. 192. And they could not agree on the scope of discovery

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ahead of the renewed motions, so Plaintiffs moved to compel outstanding jurisdictional discovery requests. *See* Dkt. 191. Ultimately, the Court entered Defendants' briefing schedule and granted both of Plaintiffs' contested motions, ordering Defendants to produce a bevy of internal documents and communications. *See id.*; Dkt. 213. On April 10, 2020, Defendants filed their renewed arbitration and jurisdiction motions, which the Parties fully briefed. *See* Dkt. 205. It was at this point that the Parties agreed to attempt to resolve these cases through mediation.

Settlement talks began in earnest in April 2020. The Parties agreed to schedule a mediation session on May 22, 2020 with Judge Layn Phillips (ret.). *See* Dkt. 218 ¶ 12. From that point forward, over the next several weeks, the Parties were in near-daily communication with the Phillips ADR team and each other, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow down potential frameworks for resolution. *Id.* ¶ 13. During this period, Defendants provided Plaintiffs with several sets of detailed transactional data, the Parties exchanged more than fifty (50) pages of briefing on the core facts, legal issues, litigation risks, and potential settlement structures, and the Parties supplemented that briefing with extensive written and telephonic correspondence, mediated by the Phillips ADR team, clarifying each other's positions in advance of the mediation. *See id.*

On May 22, 2020, the Parties participated in a full-day (indeed, more than twelve-hour-long) video-mediation. *See id.* ¶ 14. Following several rounds of arms-length negotiations facilitated by Judge Phillips, the Parties agreed to a settlement in principle, which was memorialized in the form of a binding term sheet. *See id.*; Dkt. 214. But the negotiations didn't end there: over the next two months, the Parties worked out the details of a fulsome final settlement agreement, exchanged several rounds of a working settlement document and supporting exhibits, met and conferred telephonically to flesh out the remaining disputed provisions, and together met and conferred with Apple Inc., Google LLC, and Facebook, Inc. (collectively, the "Platform Providers") to help design a robust Notice Plan. *See* Dkt. 218 ¶ 16. On July 23, 2020, the Parties executed the Settlement Agreement before the Court. *See id.* ¶ 29.

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IV. Class Counsel's Litigation-Adjacent Efforts On Behalf Of The Class.

As a necessary extension of the traditional litigation work necessitated by these cases, Class Counsel has for years undertaken all manner of litigation-adjacent work for the benefit of the Class. These efforts are organized into three categories and summarized below.

First, Class Counsel went to great lengths to protect this litigation from collateral administrative attacks. Just two weeks after the Ninth Circuit's mandate issued in *Kater*, Big Fish dispatched its Covington & Burling lawyers—*i.e.*, the same lawyers defending *Kater*—to the WSGC session in Tacoma to present a "Petition for a Declaratory Order" asking the Commission to declare that Big Fish's games "do[] not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237." Dkt. 79-5 at 1. At each of the three public hearings that followed—in July 2018 (in Tacoma), August 2018 (in Pasco), and October 2018 (in Olympia)—Class Counsel appeared before the Commission, and Class Counsel presented live argument at both the Tacoma and Pasco hearings. *See* Logan Decl. ¶ 10. Class Counsel supplemented these appearances with a formal letter to the Commission (ahead of the Tacoma hearing) and, on the Commission's request, with an eighteen-page comment for the Commission's consideration (between the Tacoma and Pasco hearings). *Id.* The WSGC ultimately declined to enter a Declaratory Order. *See* Dkt. 74-1. And even after the initial declaratory order proceedings, Class Counsel continued to represent the interests of the Class in additional flare-ups before the WSGC, including in similar declaratory order proceedings initiated by The Stars Group. *See* Logan Decl. ¶ 11.

Second, Class Counsel has been the frontline opposition to Defendants' attempt to change Washington's gambling laws. Starting in early 2019, the International Social Gaming Association ("ISGA") provided legislators draft legislation that would amend Washington's gambling statutes with the effect (and specific intent) of gutting these lawsuits. *See id.* ¶ 12. Over time, these efforts gained steam, with Senators Mark Mullet and John Braun, as well as Representatives Zack Hudgins, Brandon Vick, Bill Jenkin and Brian Blake, collectively sponsoring four (4) bills threatening to kill these cases by "clarifying" that players who lose

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money playing social casinos cannot recover under the RMLGA. H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020); S.B. 6568, 66th Leg., Reg. Sess. (Wash. 2020); H.B. 2041, 66th Leg., Reg Sess. (Wash. 2019); S.B. 5886, 66th Leg., Reg. Sess. (Wash. 2019). Local and national media covered these efforts and left no doubt as to what the ISGA hoped to accomplish. *See, e.g.*, Phillip Conneller, *Washington State Social Gaming Legislation Could Rescue Big Fish Casino From Legal Trouble*, CASINO.ORG (Jan. 29, 2020), *available at* https://bit.ly/39dKtWM.

In response, Class Counsel engaged the lobbying firm Peggen & Mara Political Consulting LLP—experts in Washington tribal and gambling laws—to help Class Counsel (i) stay on top of all administrative and legislative developments in the Washington gaming industry; (ii) understand the intricacies of Washington's specific legislative process, including the nuances of—and procedures for—bill drafting; (iii) understand who the relevant lawmakers and stakeholders in Washington's gaming industry were, what those lawmakers and stakeholders cared about, and how Class Counsel could educate those lawmakers and stakeholders about social casinos; and (iv) work with legislative groups, task forces, and other interested parties in in Washington's gaming industry, including the Washington Indian Gaming Association ("WIGA"). *See* Logan Decl. ¶ 13.

Class Counsel then used this information and expertise to amplify the Class's interests and concerns. Class Counsel drafted memos and prepared handouts for a variety of stakeholders, including State Senators and Representatives, the WIGA, the Washington Trial Attorneys' Association, the Public Interest Research Group, and other organizations dedicated to remedying problem gambling. *Id.* ¶ 14.

Class Counsel also personally met with lawmakers in the Washington Senate and House, met with officials in the Executive branch, and provided in-person testimony to the Washington Legislature. *Id.* ¶ 15. For example, in January 2019—after Class Counsel got wind that Defendants and the ISGA were planning to gut Washington's gambling statutes (in what would become the failed H.B. 2041 and S.B. 5886)—Class Counsel met in-person with Representative Shelley Kloba, then-Representative (and now Senator) Derek Stanford, Lieutenant Governor

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Cyrus Habib, and several other government officials. *Id.* ¶ 16. On January 28, 2020, Class Counsel met with Senator Stanford at the State Capitol—following Class Counsel's written and in-person testimony before the House Civil Rights & Judiciary Committee in (successful) opposition to H.B. 2720. *Id.* ¶ 17.

Class Counsel's efforts went beyond in-person testimony and meetings with legislative and executive officials. On March 21, 2019, Class Counsel sent formal correspondence to Senator Mark Mullet ahead of a planned work session before the Senate and Financial Institutions, Economic and Trade Committee about the *Kater* matter—in which Defendants Aristocrat and Big Fish Games had been invited, but Class Counsel had not. *Id.* ¶ 18. In August 2019, Class Counsel traveled to Anacortes—on Swinomish Tribe land—to speak at a monthly WIGA meeting, in opposition to the ISGA-backed bills. *Id.* ¶ 19. And in early 2020, Class Counsel coordinated the submission of more than 200 letters to Washington State Representatives from Big Fish Casino players across the country and spoke with local press about the ISGA's renewed efforts to gut these lawsuits. *See id.* ¶ 20; *see also* Melissa Santos, *'Free' casino apps prey on addiction, users say, and WA lawmakers are considering a crackdown*, CROSSCUT (Feb. 7, 2020), *available at* https://bit.ly/3hfFxDl. These efforts held the line. Each bill introduced over the past two years has stalled.

Third, beyond Class Counsel's work on legislative and administrative fronts, Class Counsel also helped its clients sound the alarm on social casinos to the public at large by helping clients share their stories with local and national media, including in the following pieces:

- *Harpooned by Facebook*, REVEAL-CENTER FOR INVESTIGATIVE REPORTING (Aug. 3, 2019), *available at* https://bit.ly/39NIdri (featuring radio interview with Class Representative Suzie Kelly)
- *How social casinos leverage Facebook user data to target vulnerable gamblers*, PBS NEWSHOUR (Aug. 13, 2019), *available at* https://to.pbs.org/3lPRd1m (featuring television interview with Class Representative Suzie Kelly)
- Melissa Santos, *'Free' casino apps prey on addiction, users say, and WA lawmakers are considering a crackdown*, CROSSCUT (Feb. 7, 2020), *available at* https://bit.ly/3hfFxDl (featuring Class Representative Suzie Kelly, Class Member Jill Interrante, and Class Counsel Alexander Tievsky)

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- *Addicted to losing: How casino-like apps have drained people of millions*, NBC NEWS (Sept. 14, 2020), *available at* https://nbcnews.to/39Lo1X1 (featuring interviews with Class Members).

V. The Settlement Now Before The Court.

Following all of these efforts, and with the assistance of the Judge Phillips, Class Counsel reached a Settlement with Defendants that provides a non-reversionary cash recovery of $155 million from which every class member who has ever lost money playing Defendants' social casino games is entitled to recover a substantial portion of their losses back. *See* Dkt. 218-1 § 1.32 (the "Agreement"). Class members with higher levels of losses are entitled to recover increasingly higher percentages of their losses, and the upper echelons of "VIP" players stand to recover more than half of their losses. *See id.* §§ 1.36, 2.1(c). The Settlement also requires Defendants to implement meaningful prospective relief, including by providing addiction-related resources within their social casino games and by creating and honoring a self-exclusion policy akin to what one might expect to soon see at the Emerald Queen or the Muckleshoot casinos. *See id.* § 2.2.

THE TERMS OF THE SETTLEMENT AGREEMENT

For the Court's convenience, the key terms of the Agreement are briefly summarized as follows:

A. Settlement Class Definition: The Settlement Class is defined as follows: "all persons in the United States who played Big Fish Casino, Jackpot Magic Slots, or Epic Diamond Slots on or before Preliminary Approval of the Settlement."[3] *See* Agreement § 1.33.

B. Monetary Benefits: Defendants agreed to establish a $155,000,000.00 Settlement Fund from which each Settlement Class Member who files a valid claim will be entitled to recover a cash payment, after deducting administrative expenses, any fee award to Class

[3] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this action and members of their families, (2) the Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, and employees, (3) persons who properly execute and file a timely request for exclusion from the class, and (4) the legal representatives, successors or assigns of any such excluded persons. *See* Agreement § 1.33.

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Counsel, and any incentive payments to the Class Representatives. *See id.* §§ 1.32, 1.35. No portion of the Settlement Fund will revert to Defendants. *Id.* § 2.1(j). Any Settlement Class Member checks not cashed within 90 days of issuance will be either be placed in a second distribution fund or donated to a Court-approved *cy pres* recipient. *Id.* § 2.1(i). As described in detail in the Plan of Allocation, the amount of each Settlement Class Member's payment will vary based on the Settlement Class Member's total losses (those with higher loss amounts are eligible to recover a greater percentage of their losses), whether the Settlement Class Member is potentially subject to Big Fish's Dispute Resolution Provision, and overall Settlement Class Member participation levels. *See id.* §§ 1.36, 2.1(c); Exhibit E. Based on its experience, Angeion Group (the "Settlement Administrator") anticipates that participating Settlement Class Members in the highest category of Lifetime Spending Amounts will recover the majority of their losses, and that participating class members in the smallest category of Lifetime Spending Amounts will recover more than 10% of their losses. *See* Dkt. 219, ¶ 53. Settlement Class Members will be able to quickly and easily estimate the amount of their potential payment on the Settlement Website. *See* Agreement § 4.2(c). Based on preliminary claims data, Class Counsel expect recoveries to fall within the range originally projected by the Claims Administrator.

C. Prospective Relief: Defendants have agreed to establish a voluntary self-exclusion policy that will allow players to exclude themselves from further gameplay. *See* Agreement § 2.2. Defendants must also make a link to that policy prominently available within the games, and their customer service representatives will provide the link to players who contact them and reference or exhibit video game behavior disorders. *See id.* Defendants have also agreed to other prospective relief measures, including changes to game mechanics such that when players run out of virtual chips, they won't need to purchase additional chips or wait to receive free additional chips to keep playing Defendants' games. *See id.*

D. Release: In exchange for the monetary relief described above, Defendants and other entities, including the Platform Providers Facebook, Apple, Google, and Amazon will be released from all claims raised in these cases relating to the operation of their casino style games

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and the sale of virtual chips in those games, including claims that the games were illegal gambling or the chips were "things of value." The full release is contained at *id.* § 1.27.

E. Attorneys' Fees and Expenses Requests & Incentive Award Requests: Contemporaneously with the filing of this motion, Class Counsel are filing a motion for attorneys' fees, expenses, and incentive awards.

ARGUMENT

I. The Court Need Not Revisit Class Certification.

A threshold inquiry at final approval is whether the Class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1022 (9th Cir. 1998). Because no relevant facts have changed since the Court certified the Settlement Class, Dkt. 221, the Court need not revisit class certification here. *See, e.g.*, *Aikens v. Panatte, LLC*, No. 2:17-cv-01519, Dkt. 54 (W.D. Wash. Feb 5, 2019) (Lasnik, J.).

II. Notice Was Successful And Satisfied Due Process.

Prior to granting final approval to this Settlement, the Court must consider whether the Class members received "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). "The rule does not insist on actual notice to all class members in all cases." *Mullins v Direct Digital LLC*, 795 F.3d 654, 665 (7th Cir. 2015); *see also Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) (noting that "even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice" and collecting cases). Although what constitutes the "best notice practicable" is case-specific, the Federal Judicial Center has noted that a notice campaign that reaches 70% of a class is often reasonable. Federal Judicial Center, *Judges' Class Action Notice & Claims Process Checklist & Plain Language Guide* 3 (2010), *available at* https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf.

The Court already provisionally approved the Notice Plan proposed by the Class Representatives and Class Counsel. Dkt. 221 at 5-6. That plan utilized both direct and

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publication notice to the Settlement Class. *Id.* To provide direct notice to all who were eligible to submit a claim for payment from the Settlement, Class Counsel worked with Counsel for Defendants and also subpoenaed a variety of third parties to obtain contact information for everyone with a Lifetime Spending Amount of greater than zero (*i.e.*, those who are entitled to make a claim against the Settlement Fund). *See generally* Declaration of Steven Weisbrot ("Weisbrot Decl.") As the Court is well aware, this was not an easy process. Class Counsel engaged in extensive negotiations with the Platform Providers. Apple, Google, and Facebook ultimately provided Class Counsel with sufficient data to effectuate the Notice Plan. Class Counsel was forced to move to compel the necessary data from Amazon. Dkt. 224. Ultimately, after two orders from this Court (*see* Dkts. 250, 256)—and even then further negotiations—Amazon provided the necessary information. *See* Weisbrot Decl. ¶¶ 22-26.

Once that data was collected, it was transmitted to Angeion Group, the Settlement Administrator, to compile a complete Class List. The Defendants and Platform Providers ultimately provided Angeion with contact information for approximately 2.8 million accounts. Once duplicate emails were removed, Angeion created a notice list of 2,228,215 emails. *See id.* ¶ 13. Angeion sent out two rounds of email notice. In the first round (which did not include Settlement Class Members whose information was provided by Amazon, given the timing of Amazon's data production), 1,074,024 emails were successfully delivered. *See id.* ¶ 14. A large portion of the emails sent in this round were prevented by Google from being successfully delivered (a so-called "soft bounce"). *See id.* ¶ 15. Angeion adjusted its strategy for email delivery on the second round of email notice, and those changes worked: during the follow-up reminder notice campaign, Angeion sent emails to 2,150,037 email addresses (those associated with an account that had not yet submitted a claim), and 2,059,603 (or 95.8%) were successfully delivered. *See id.* ¶ 27.

Additionally, using the information provided by Defendants and the Platforms, Angeion performed a "reverse look-up" to find mailing information for every account with at least $100 in Lifetime Spending Amount. *See id.* ¶ 12. That analysis yielded 122,521 postal addresses. *Id.*

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That data was combined with address information provided by the Platforms. *See id.* ¶ 13. Angeion sent postcard notice to each of these individuals via First Class U.S. Mail. All told, Angeion sent postcard notice to 230,234 addresses. *See id.* ¶ 17.

As of December 9, 2020, 2,213 Postcard Notices were returned by the USPS with a forwarding address. *Id.* ¶ 20. Angeion updated its database with the new addresses and Postcard Notices were forwarded to the new addresses. *Id.* Also as of December 9, 2020, 21,079 Postcard Notices were returned as undeliverable by the USPS without a forwarding address. *Id.* ¶ 21. Angeion conducted address verification searches ("skip traces") in an attempt to locate updated addresses. *Id.* Angeion identified 15,392 updated addresses via skip tracing and updated its database with the new addresses to be remailed. *Id.*

Direct notice was to be supplemented by online publication notice in the form of digital advertisements targeted to be seen by individuals most likely to be part of the Settlement Class. As an Angeion employee averred at preliminary approval, digital advertisements were placed using leading technology intended to target members of the Settlement Class. *See* Dkt. 219 ¶ 32. This program was designed to reach an overinclusive population, and was projected to have around an 80% reach of the entire class. *See* Weisbrot Decl. ¶¶ 34, 36. That aspect of the Notice Plan has been successfully implemented. The publication notice was published in a full-page ad in PC Gamer magazine, which has an estimated circulation of 50,800. *See id.* ¶ 42. Given the extent to which social casino players are active on Facebook, Angeion also purchased sponsored ads on Facebook. *See id.* ¶ 38. The Facebook ads have generated 43,071,747 impressions. *See id.* In addition, traditional internet banner ads were purchased. *See id.* ¶ 40. To date, those ads have generated 36,428,084 impressions. *Id.* The banner ads began running on November 9, 2020 and will run for 60 consecutive days. *Id.*

Finally, all forms of notice accurately described the Settlement and directed the recipient to the Settlement Website, where Class Members can review the Plan of Allocation, use a slider tool to estimate in real time how much of their losses they are projected to recover through the Settlement, and file a claim. *See* Agreement § 4.2(c); Dkt. 217 at 9.

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These early numbers confirm what the Court already provisionally found: the Notice Plan here constituted the "best practicable notice" under the circumstances, and was reasonably calculated to apprise interested Settlement Class Members of their rights under the Settlement. Apart from one hiccup with soft-bounces on the first-round email notice (which was promptly rectified), there have been no issues noticing the Settlement Class, and initial figures confirm the estimates provided to the Court at preliminary approval. The Court should therefore find that the Notice Plan ultimately complied with Due Process.

III. The Court Should Finally Approve The Settlement.

To approve the settlement of a class action as fair, reasonable, and adequate, Rule 23(e) requires Court to consider "whether (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other." These factors largely encompass those identified by the Ninth Circuit for evaluating a class settlement. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

The Committee Notes to the recent revision of Rule 23 make clear that the newly enumerated factors were not intended to replace approval factors already used in courts around the country, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Thus, courts examine the new Rule 23 factors alongside the traditional *Churchill* factors relevant to the particular case,

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mindful that there is considerable overlap between the two. *See, e.g.*, *Walters v. Target Corp.*, No. 3:16-cv-1678-L-MDD, 2020 WL 6277436, at *5 (S.D. Cal. Oct. 26, 2020).[4]

A. Class Counsel and the Class Representatives have adequately represented the Class and support the Settlement.

Class Counsel's representation of the Class' interests here was not just adequate; it was extraordinary. Class Counsel filed this case, in 2015, asserting its own novel interpretation of Washington gambling law as applied to the brand-new social casino industry. After the district court dismissed the case with prejudice (echoing a chorus of other federal district courts who at first could not see how social casinos could constitute gambling), Class Counsel nevertheless appealed and obtained a landmark decision from the Ninth Circuit. Upon remand, Class Counsel had to defend Washington's gambling laws from repeated attacks both in the WSGC and in the Washington State Legislature. Class Counsel also employed novel and "enterprising" tactics to fend off Defendants' repeated attempts to force Plaintiffs and the Class to arbitration, leading to a dizzying array of motions seeking injunctions and protective orders. *See* Mar. 4, 2020 Hr'g Tr. at 5:9. All the while, Class Counsel dispensed with motion after motion from Defendants' fleet of large law firms. Time and time again, Class Counsel held the line and marched the case closer to class certification and trial, ultimately leading to the Settlement now before the Court. All of these efforts demonstrate that Class Counsel provided more than adequate service to the Class in this case.

Class Representatives Kater, Kelly, and Thimmegowda likewise adequately represented the Class. Each remained in regular communication with Class Counsel, timely responded to requests for information, closely reviewed papers, answered written discovery, provided documents to aid in Class Counsel's prosecution of the case, closely reviewed the terms of the Settlement, discussed the Settlement with Class Counsel, and signed the Settlement because they believe it is fair and in the best interests of the Class. *See* Declaration of Cheryl Kater ("Kater

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[4] There is no governmental participant here, so that factor is neutral. Further, to date, there are no agreements that must be identified under Rule 23(e)(3), nor do counsel anticipate reaching any such agreements.

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Decl.") ¶ 5; Declaration of Suzie Kelly ("Kelly Decl.") ¶ 5; Declaration of Manasa Thimmegowda ("Thimmegowda Decl.") ¶ 5. Those services were far more than adequate.

The Court may also consider Class Counsel's support of the Settlement, which can be considered and also favors approval. *In re Bluetooth*, 654 F.3d at 946. It is well-established that "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (quotations omitted). Class Counsel here are the only lawyers with experience prosecuting these types of claims, and it is their considered judgment that this Settlement represents an outstanding result for the Settlement Class.

B. The Settlement was negotiated at arm's length.

To say the Settlement here was negotiated at arm's length and was the product of non-collusive negotiations—as the Court has already preliminarily found—would be quite the understatement. *See* Dkt. 221 at 4. The Settlement was reached only after an intense, 12-hour mediation, followed by months of further negotiations about the mechanics, supports a finding that there was not a hint of collusion here. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); *Helde v. Knight Transp., Inc.*, No. 2:12-cv-00904 RSL, Dkt. 191 at 2 (W.D. Wash. May 24, 2017) (granting preliminary approval where "Settlement Agreement resulted from extensive arm's-length negotiations, with participation of an experienced mediator"); *Gragg v. Orange CAB Co., Inc.*, No. 12-cv-0576 RSL, 2017 WL 785170, at *1 (W.D. Wash. Mar. 1, 2017) (same). The Parties reached this Settlement only after years of intense litigation marked by round after round of contested issues, with Class Counsel and defense counsel agreeing on almost nothing of substance over life of the case.

Moreover, this Settlement contains none of the red flags the Ninth Circuit has identified as indicative of possible collusion: (1) "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded," (2) "when the parties negotiate a 'clear sailing' arrangement," and (3) "when the

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parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *In re Bluetooth* 654 F.3d at 947 (quotations omitted). Class Counsel's fee will be determined separately, but as explained in Class Counsel's fee petition, they seek a percentage recovery that is consistent with Washington law and Ninth Circuit precedent, reflects their work here, and is proportionate. Moreover, the Settlement does not contain a "clear sailing" agreement; Defendants are free to object to Class Counsel's fee petition if they so desire. Agreement § 8.1. And there is no reverter here. All Settlement funds will go to Class Members, less Class Counsel's fees and any administrative costs. *Id.* § 1.35. This consideration clearly supports final approval.

C. The amount offered in Settlement is adequate, taking into account the strength of Plaintiffs' case, and the risks inherent in further litigation.

Even before the revised Rule 23 highlighted that the Court should consider the amount offered in settlement, courts recognized that the size of any settlement, compared to the likelihood of full recovery, "is generally considered the most important" factor in evaluating a settlement. *See Bayat v. Bank of the West*, No. C-13-2376 EMC, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015). Here, an evaluation of the risks present in this litigation, combined with an assessment of the scope of relief, shows that the Settlement easily qualifies as fair, reasonable, and adequate.

i. The Settlement Class would have faced significant delay before it could have recovered anything on the merits.

Class Counsel has always been confident about prevailing on the merits of these cases. The key legal questions, particularly under the RMLGA, are straightforward, and have, in Class Counsel's view, been conclusively answered by the Ninth Circuit's decision in the appeal in the *Kater* matter. Nevertheless, the case presented some legal risks. For instance, several of the defendants in this and related cases have raised the contention that the regular provision of free chips within their gambling games meant that the chips themselves were not "things of value." *See, e.g.*, *Benson v. DoubleDown Interactive, LLC*, No. 18-cv-525, Dkt. 103 (W.D. Wash. June

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17, 2020) (seeking to certify issue to the Washington Supreme Court). Plaintiffs, of course, disagree, and this Court dismissed that contention at every turn, relying on the Ninth Circuit's decision in *Kater*. But it is also true that the opinion in *Kater* specifically notes that the court did not consider Defendants' specific arguments about the regular provision of free chips. *See* 886 F.3d at 787.

But as Plaintiffs explained at preliminary approval, the principal risk here was legislative, *i.e.*, the chance that Defendants' efforts at changing the law, either through the Washington Legislature or the WSGC, would succeed before this matter reached judgment, and leave Settlement Class Members with nothing. Plaintiffs' counsel have thus far fended off the ISGA's phalanx of well-heeled lobbyists, but Defendants and their ISGA comrades are formidable opponents. If these cases do not settle now, each legislative cycle the class will be at risk of having their claims eviscerated in the name of "remov[ing] . . . economic uncertainty" by "clarifying" that proposed class members cannot recover under the RMLGA. H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020).

This legislative risk is particularly acute here because it is practically inevitable that this case would take years to reach judgment. Pending at the time the Parties settled was, of course, a renewed motion to compel arbitration, the denial of which would lie an immediate appeal as of right. *See* 9 U.S.C. § 16. Such an appeal would itself take at least a year. The Parties have thus far fought tooth and nail over every aspect of discovery, and there is every reason to believe that would have continued had the case not settled. Such discovery fights would inevitably prolong the discovery period here, after which the Parties would heavily contest class certification and, perhaps, summary judgment, and then trial. The history of the case so far also suggests that any trial verdict was bound to be appealed, further lengthening the proceedings.

Courts have regularly recognized that the prospect of significant delay while a case works its way to judgment is reason to favor immediate settlement. After all, one dollar today is worth significantly more than one dollar three years from now. *Rodriguez*, 563 F.3d at 966 ("Inevitable appeals would likely prolong the litigation, and any recovery by class members, for years. This

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factor, too, favors the settlement."); *Ikuseghan v. Multicare Health Sys.*, No. 3:14-cv-05539 BHS, 2016 WL 3976569, at *4 (W.D. Wash. July 25, 2016) ("[T]he outcome of trial and any appeals are inherently uncertain and involve significant delay. The Settlement avoids these challenges."). But delay is especially problematic here. The longer the case survives, the more opportunities Defendants and their allies would have to effect retroactive change to the law.

ii. Given the risks involved with further litigation, the amount offered in Settlement is outstanding.

The cornerstone of this Settlement is a $155 million non-reversionary common fund, which will be used to help Settlement Class Members recoup their losses. That is an "astounding" recovery. Rubenstein Decl. ¶ 2. It is a significant enough sum that Class Members with the largest Lifetime Spending Amounts stand to recover more than 50% of their losses, and that no participating class member is likely to recover less than 10% of their losses. Dkt. 219 ¶ 53. By way of example, Class Representatives Thimmegowda, Kater, and Kelly, who have previously estimated their losses at approximately $4,000, $40,000, and $400,000, are according to those estimates projected to recover $500-$1,000 (Thimmegowda), $10,000-$20,000 (Kater), and $200,000-$300,000 (Kelly). *Id.* ¶ 52.

It is difficult to compare this recovery to the recovery provided for under other comparable settlements, given that this case has no true peers to be reasonably measured against. On the facts, the closest comparator is almost certainly *In re Apple In-App Purchase Litigation*, in which the class alleged that certain apps offered within Apple's App Store were "highly addictive, designed deliberately so, and tend to compel children playing them to purchase large quantities" of in-game currency, "amounting to as much as $100 *per purchase* or more." 2013 WL 1856713, at *1 (emphasis added). But there, the settlement established no common fund at all, the default recovery for participating class members was five dollars (yes, $5), and with adequate proof some claiming class members could claim refunds for a single 45-day period of purchases. *Id.* at *5. Similarly, in *Kim v. Tinder, Inc.*, the class alleged unfair pricing with regard to in-app purchases in a popular dating app. No. CV 18-3093-JFW(ASX), 2019 WL 2576367, at

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*2 (C.D. Cal. June 19, 2019). The settlement established no common fund at all, and participating class members received 50 free "Super Likes" (*i.e.*, coupons) in addition to an option to select a $25 cash payment (as an alternative to other coupon offers). *Id.* Simply put, there is just no comparison between the settlements that have ever previously been reached in factually-similar cases and the Settlement currently before the Court.

Perhaps the better measuring stick for this Settlement are class action settlements in the consumer privacy space, given that those settlements often resolve large (statutory) damages claims and are premised on novel interpretations of law as applied to allegations of internet-based misconduct. Consumer privacy settlements, too, are notorious for failing to provide consumers with real-world relief for the damages they have suffered. For example, *In re Google Referrer Header Privacy Litigation*, 869 F.3d at 740 approved the settlement where all of the money was to go to *cy pres*, with no cash relief for the class at all. *Gaos*, 139 S. Ct. at 1045. And even in consumer privacy settlements that do provide monetary relief and have been adjudged to be fair and reasonable by district courts, the relief is often primarily in-kind. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 324 (N.D. Cal. 2018) (explaining that less than 10% of the "fund" was available for cash payments, with the rest being reserved to purchase credit monitoring services); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *22 (N.D. Cal. July 22, 2020) (cash relief made available only to class members with existing credit monitoring, out-of-pocket losses, and who paid Yahoo! for premium services).

And beyond the cash recovery, the Settlement provides for substantial non-monetary benefits. The Settlement requires Big Fish to implement meaningful prospective relief, including by providing addiction-related resources within its social casino games and by creating and honoring a meaningful self-exclusion policy. *See* Agreement § 2.2. Given the fervor with which Defendants have long insisted that their games are not gambling, these in-game changes are a monumental achievement for the Settlement Class. They represent the first steps toward much-needed self-regulation within the social casino industry and given Big Fish's prominence in the

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social casino industry, other industry players have and will continue to follow suit.

These measures also highlight that resolving this case now is itself a benefit. Recall that Plaintiffs allege that many members of the Settlement Class are problem gamblers, whose addictions cause real-world problems like devastating credit card bills. Had the case not settled, Settlement Class Members would have continued to suffer these and other similar harms, perhaps with devastating and irreversible consequences in some cases. Bringing this litigation to a beneficial conclusion now will forestall these harms from occurring, a potentially incalculable benefit to some Settlement Class Members.

In sum, the amount offered in the Settlement, when compared with the risks and expense of further litigation, strongly supports final approval.

D. The Settlement treats Settlement Class Members equitably.

The revised Rule 23 further asks courts to assess whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). The Rule's revised text makes clear that *equal* treatment is not required, but fair treatment is instead the goal. The Settlement here achieves that goal.

As the Court explained at preliminary approval, and as hashed out in detail in the Plan of Allocation, a Settlement Class Member's total recovery will depend on the extent of their losses (*i.e.*, those with greater losses will recover a higher proportion of their losses), whether the Settlement Class Member opted out of Big Fish's Dispute Resolution Provision after seeing the pop-up displayed in late 2019 and early 2020, and on the number of claims. Dkt. 221 at 3-4. The Plan of Allocation therefore distributes Settlement funds according to those who have suffered the greatest harm, and those with the stronger legal claims.

Allocating settlement funds in this way achieves an equitable result. Settlement Class Members with tens or hundreds of thousands of dollars in losses have frequently suffered serious collateral harms, such as alienation from family or friends, or the accrual of huge debts, that were not suffered by those who may have purchased $10 or $20 worth of chips. And even though all Settlement Class Members have equally strong RMLGA claims, Settlement Class Members with

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huge losses who accessed Defendants' VIP tiers and interacted with a VIP host may have a stronger CPA claim to release here. Likewise, those who did not opt out of Defendants' purportedly mandatory dispute resolution provision still have a strong RMLGA claim, and while Class Counsel do not believe the provision is or was binding, if those Class Members had been compelled to arbitration they could have seen their losses cut by, for instance, a provision in the Terms of Use which purports to bind users to a shorter limitations period than is codified in Washington law. As explained above, in Class Counsel's view, the Class stands largely on equal footing. But a clear-eyed assessment of the risks that lay ahead demonstrates that certain claims are stronger than others, something appropriately reflected in the Plan of Allocation. *See In re Equity Funding Corp. of Am. Securities Litig.*, 603 F.2d 1353, 1365 (9th Cir. 1979) (concluding that the district court's approval of certain offsets "in [a] Plan of Allocation was a component of its duty to insure the equitable distribution of the settlement proceeds"); 2 McLaughlin on Class Actions § 6.23 (17th ed. 2020) ("Allocation formulas, including certain discounts for certain types of claims within a class, may properly take into consideration the comparative strengths and values of different categories of the settled and released claims.").

Likewise, the provision of service awards for the Named Plaintiffs is consistent with the equitable treatment of class members. Cheryl Kater and Manasa Thimmegowda each seek an award of $10,000, as explained below. This modest award reflects their service to the Class. Each put their name to a lawsuit that advanced a novel theory and that ultimately allowed injured individuals to recoup thousands of dollars in losses. While that is typical of class plaintiffs, the risk of reputational injury here is higher, given the subject matter of the lawsuit. Kater and Thimmegowda also provided significant formal and informal discovery that allowed Class Counsel to determine the best size and structure of any settlement. They also reviewed pleadings and participated in the settlement process. Each estimates that they spent dozens of hours in service to the Settlement Class. As explained in the separate motion for incentive awards, an award of this size is in line with other awards given to class representatives, and fairly reflects their service to the Settlement Class. Given that their efforts were key to ensuring that the

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Settlement Class recovered anything, the modest proposed incentive award for Kater and Thimmegowda is fully consistent with equity.

Suzie Kelly seeks an award of $50,000. Despite its size, this award, too, is equitable, in light of Kelly's extraordinary contributions to the Settlement Class. As explained elsewhere in this brief, and in other papers related to this Settlement, the field of battle in this litigation extended far beyond the courtroom. Significant effort was expended on both sides to lobby regulators and legislators. Suzie Kelly was instrumental in these efforts. Of the dozens of individuals Class Counsel spoke to who had incurred six-figure losses to the casino gambling apps at issue in this cluster of cases, most were unwilling to attach their name to their story, and only Kelly was willing to serve as Class Representative. But these stories were among the most powerful and were key to Class Counsel's efforts to preserve the protections that Washington law provides. More, Kelly agreed to an on-camera interview with PBS Newshour in which she shared her story with the world, including details about her addiction, and the harms it had led her to cause to those around her. That step has proven to be a great personal sacrifice for Kelly, as her decision to share her story continues to be a source of personal hardship. It is Class Counsel's considered judgment, however, that Kelly's decision to share her story was instrumental in helping Class Counsel negotiate the instant Settlement. Thus, Kelly's extraordinary personal service to the Class deserves recognition. Given Kelly's extraordinary service to the Settlement Class, a $50,000 award to her also is fully consistent with equity.

In sum, the Settlement treats all Class Members equitably relative to each other, supporting final approval.

E. Class Counsel had completed sufficient discovery to reach an informed judgment about the benefits of settling, and the quality of the Settlement.

Next, the Parties "had enough information to make an informed decision about the strength of their cases and the wisdom of settlement." *Rinky Dink Inc. v. World Bus. Lenders, LLC*, No. C14-0268-JCC, 2016 WL 4052588, at *5 (W.D. Wash. Feb. 3, 2016). The Parties only agreed to mediate after more than five years of contentious litigation, and consequently mediated

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with a crystal-clear understanding of the strengths and weaknesses of the Parties' claims and defenses. *See* Dkt. 218 ¶ 26. And while the Parties did not conduct a substantial volume of formal discovery prior to mediation, proposed Class Counsel independently undertook massive informal discovery efforts throughout these cases. *See id.* Those efforts involved frequent communications with members of the proposed class, the collection of large numbers of documents possessed by proposed class members (*e.g.*, emails, text messages, and in-game chat exchanges with Defendants' "VIP Hosts"), informal communications and/or attempts with Defendants' former employees, and more. *See id.*

Moreover, in the weeks before the mediation, Defendants provided Plaintiffs with several sets of detailed transactional data for virtual chip purchases; the Parties exchanged reams of briefing on the core facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive written and telephonic correspondence, mediated and shuttled by the Phillips ADR team, clarifying each other's positions in advance of the mediation. *See id.* ¶ 13. The May 22, 2020 mediation session lasted more than twelve hours. *See id.* ¶ 14. It was only at the end of that long day, and with the skilled assistance of Judge Phillips and his Phillips ADR team, that the Parties were able to hash out a settlement. *See id.* By then, the Parties were fully informed on all pertinent issues and capable of assessing the benefits of the settlement now before the Court. *See id.* ¶ 15; *Ikuseghan*, 2016 WL 3976569, at *3 (approving settlement reached "between experienced attorneys who are familiar . . . with the legal and factual issues of this case in particular"). This factor, too, thus supports final approval.

F. The reaction of the Settlement Class has been favorable.

Finally, current claim data indicates that the Class has responded favorably to the Settlement, warranting final approval. Thus far, the Settlement Administrator has received more than 50,000 claims. Weisbrot Decl. ¶ 44. Astoundingly, for a settlement of this size, and given the breadth of publication notice about the Settlement, only one person has opted out and nobody has filed an objection. *Id.* ¶ 45. Such low opposition to the Settlement speaks volumes regarding the fairness and adequacy of the Settlement. "When few class members object, a court may

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appropriately infer that a class action settlement is fair, adequate, and reasonable." *Schneider v. Wilcox Farms, Inc.*, No. 07-CV-01160-JLR, 2009 WL 10726662, at *3 (W.D. Wash. Jan. 12, 2009). Courts in this district have found that class reaction supported final approval even with significantly higher exclusion and objection rates. *See Pelletz v. Weyerhouser Corp.*, 255 F.R.D. 537, 543-44 (W.D. Wash. 2009) (lauding "positive response" of Settlement Class of 110,000 to 140,000 members where 19 excluded themselves from the settlement, and 3 objected); *Clemans v. New Werner Co.*, No. 3:12-cv-5186, 2013 WL 12108739, at *5 (W.D. Wash. Nov. 22, 2013) (in settlement involving class of 300, one objection and four exclusions were filed, court found that "the overwhelming non-opposition to and participation in the Settlement [are] strong indications of Class Members' support for the Settlement as fair, adequate, and reasonable."); *see also Rodriguez*, 563 F.3d at 967 (concluding that the district court "had discretion to find a favorable reaction" when 54 of 376,301 class members objected to settlement); *Churchill Vill.*, 361 F.3d at 577 (affirming approval of class action settlement where 45 of 90,000 class members objected). Given the high participation rates here, and near total absence of any opposition to the Settlement, the Court should find that the reaction of the Settlement Class also favors final approval.[5]

CONCLUSION

The Court should finally certify the Settlement Class and grant final approval to the instant Settlement.

Respectfully submitted,

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[5] Consistent with the Court's order at Dkt. 223, Class Counsel intend to file a supplemental brief with final claims numbers and projected recoveries after the claims deadline and prior to the final fairness hearing.

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